

No. 78-1467

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

ARNOLD H. MIDTAUNE, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that information in the affidavit supporting a warrant authorizing a search of his office for certain business records was stale.¹

1. Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to three years' imprisonment and a fine of \$6,000. The court of appeals affirmed (589 F. 2d 370; Pet. App. A-1 to A-8).

The sufficiency of the evidence is not disputed. Briefly stated, the evidence adduced at trial showed that petitioner represented to county welfare department employees that rent supplement recipients were

¹He also argues that there was insufficient probable cause to support the warrant (Pet. 17-19). This claim is fully answered by the court below (see Pet. App. A-2 to A-6), on whose opinion we rely.

living in rental units he owned and operated, when in fact they lived elsewhere. The department mailed rent supplement checks directly to petitioner, and he split the proceeds from these checks with the recipients (Tr. 116-118; 120-212; 202-203; 233-237).²

Prior to trial, petitioner filed a motion to suppress certain business records seized by the government on September 1, 1977, pursuant to a search warrant (Pet. App. A-5). A United States Magistrate denied petitioner's motion (Pet. 6). Petitioner then requested a *de novo* determination of his motion to suppress in the district court; the district court denied the motion (*ibid.*).

2. Petitioner contends (Pet. 7-16) that the issuance of the search warrant was improper because the information in the supporting affidavit was stale. In making his staleness argument, petitioner (1) assumes that the warrant was invalid unless the affidavit gave probable cause to believe that he was engaged in the commission of a "continuing offense" (Pet. 8, 11, 14), (2) asserts that the affidavit was "patently devoid of any essential averments of time" (Pet. 15), and (3) contends that the decision in this case conflicts with decisions of at least three other circuits (Pet. 10, 15). Petitioner is incorrect on all three counts.

²Qualified persons could receive rent supplements by showing that they lived in the county. Proof of county residence was made by producing a form signed by the landlord of the residence in question. The form, a number of which were signed by petitioner, indicated that a given recipient was living at a given address, the amount of the rent, and the name of the landlord. The county welfare department verified this information by contacting the landlord. With the recipient's consent, the rent supplement checks were mailed directly to the landlord (Tr. 22-29; 31-32).

The staleness issue, properly stated, is an essentially factual question whether the affidavit contained information of sufficient recency to give probable cause to believe that the property described in the warrant application—business records evidencing a mail fraud violation—would still be located on the premises to be searched at the time the warrant was sought. *Andresen v. Maryland*, 427 U.S. 463, 478-479 n.9 (1976); *Bastida v. Henderson*, 487 F. 2d 860, 863 (5th Cir. 1973). The length of time that has elapsed between the date of the warrant and the most recent items of information contained in the affidavit is only one factor to be considered in making this determination, there being no arbitrary rule on how long a lapse is tolerable. See *United States v. Guinn*, 454 F. 2d 29 (5th Cir.), cert. denied, 407 U.S. 911 (1972). Other factors include the type of criminal activity under investigation and the character of the property sought. *Andresen v. Maryland*, *supra*; *United States v. Steeves*, 525 F. 2d 33 (8th Cir. 1975); *Bastida v. Henderson*, *supra*.

Because the property at issue here was business records, the magistrate could reasonably assume that the property "would be maintained at [petitioner's] office for a substantial period of time" (Magistrate's Report and Recommendations at 3). See *Andresen v. Maryland*, *supra*; *United States v. Forsythe*, 560 F. 2d 1127, 1132 (3d Cir. 1977). Information in the affidavit gave reasonable cause to believe that the records sought could be found in petitioner's office when the warrant issued. Information supplied by two unnamed informants and recounted by the affiant, together with the affiant's description of what he found in checking county welfare records, indicated that petitioner had been involved in a fraudulent rent

supplement scheme at least from August 1976 through January 1977 (Pet. App. A-3 to A-4 n.2). Information supplied to the affiant by a Special Investigator of the United States Postal Inspection Service indicated that, at least as recently as August 22, 1977—little more than a week before the warrant issued—records relating to petitioner's rental properties were being kept at his office at 26 Oak Grove in Minneapolis, the premises for which search authority was sought (Pet. App. A-4 n.2). Thus, contrary to petitioner's contention, the affidavit contained essential averments of time, and, read as a whole in a common sense fashion, it gave probable cause to believe that petitioner had violated 18 U.S.C. 1341 and that evidence of the violation could be found at his office at 26 Oak Grove at the time the warrant issued. *Andresen v. Maryland*, *supra*. See also *United States v. Harris*, 403 U.S. 573, 579 n.* (plurality opinion), 589 (Harlan, J., dissenting) (1971).³

There is no merit to petitioner's contention (Pet. 10, 15) that decisions of three other circuits conflict with the decision of the court of appeals in this case. All of the cases on which petitioner relies for the alleged conflict are factually distinguishable. The affidavit in *Rosencranz v. United States*, 356 F. 2d 310 (1st Cir. 1966), had no averments of time at all. In each of the three other cases on which petitioner to believe that the affidavit did not give probable cause relies, the evidence sought, given its character, would be retained on the premises to be searched for more than a short time. *United States v. Solario*, 577 F. 2d 554 (9th Cir. 1978) (gun carried by a relative of the owners of the premises to be

³There is no suggestion that the statute of limitations would have run on this offense by September 1, 1977, when the warrant issued.

searched); *United States v. Neal*, 500 F. 2d 305, 309 (10th Cir. 1974) (stolen auto parts and license plates); *Durham v. United States*, 403 F. 2d 190 (9th Cir. 1968) (equipment for counterfeiting currency).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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